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No. 85

In the Supreme Court of the United States

OCTOBER TERM, 1929

UNITED STATES OF AMERICA, PETITIONER

v.

MUNSON STEAMSHIP LINE

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE FOURTH CIRCUIT AND BRIEF IN SUPPORT THEREOF

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PETITION

The Attorney General, on behalf of the United States, prays that a writ of certiorari issue to review the judgment of the Circuit Court of Appeals for the Fourth Circuit entered in the above-entitled cause on January 18, 1930 (R. 203), affirming the judgment of the District Court of the United States for the District of Maryland. (R. 18.)

STATEMENT

The United States, at the request of the Interstate Commerce Commission (hereinafter sometimes called "the Commission"), filed under Section 20 (9) of the Interstate Commerce Act a peti-

tion for writ of mandamus praying that respondent be required to file with the Commission as required by Section 6 of the Interstate Commerce Act schedules and tariffs of rates and charges on property which was being transported, partly by railroad and partly by water, under a common arrangement for continuous carriage and shipment from interior points to ports in Florida. (R. 1–9.) The petition alleged that property brought by rail to Baltimore, Maryland, and carried on respondent's steamships to Miami and Jacksonville, Florida, was moving under a common arrangement for through shipment. Respondent's answer alleged that this transportation consisted of an independent rail and water movement and denied that respondent was obligated to file any tariffs with the Commission. (R. 10–15.)

Respondent is a New York corporation not under the control or management of any railroad. (R. 102.) It maintains a steamship line with regular fortnightly sailings from Baltimore to Florida and Cuba. (R. 27.) The Baltimore & Ohio Railroad Company, Pennsylvania Railroad Company and Western Maryland Railway Company carry freight from various interior points for delivery to respondent's boats at Baltimore. (R. 10–11.) This freight, when destined for Havana, Cuba, moves on through bills of lading (R. 65), but when destined for Florida ports the transportation is effected as follows:

If a shipper at an interior point wishes to send goods to Miami or Jacksonville via respondent's steamship line from Baltimore, respondent will inform him as to the amount of the total transportation charge, stating separately the railroad tariff to Baltimore and respondent's charges from Baltimore to Florida destination. (R. 31, 35, 46–47.) The railroad issues a local bill of lading calling for transportation to Baltimore and naming as consignee either respondent or the ultimate consignee in care of, or "notify," respondent. (R. 119, 137, 149, 161, 173.) The name of the ultimate consignee and the Florida destination are noted on the face of the bill of lading. (R. 119, 137, 149, 161.) The shipper sends the bill of lading to respondent with a letter of instruction as to the ultimate consignee. (R. 36.) On the arrival of the goods in Baltimore the railroad notifies respondent. (R. 37.) The latter advises the railroad of the ship which will carry the goods to Florida and, after the railroad delivers the freight, respondent receives it, puts it on board and receipts to the railroad for delivery. (R. 37.) If the railroad's bill of lading is an order bill, the goods are delivered only against surrender of this bill by respondent. (R. 39–40.) Respondent pays the railroad charges for the shipment to Baltimore and issues its ocean bill of lading from Baltimore to the Florida destination. (R. 37–38.) It there collects from the consignee the total transportation charge from point of origin to destination. (R. 37–38.)

Freight could be transported in this way from interior points to Florida ports without any act or intervention by the shipper from the time of delivery to the initial railroad carrier to the time of receipt of the goods by the Florida consignee other than the shipper's instructions to respondent as to the Florida consignee, which instructions might be given when the goods were delivered to the railroad. (R. 36, 52, 85.) The physical movement from point of origin to destination was the same as in the case of goods moving on a through bill of lading. (R. 73.) The Merchants & Miners Transportation Company carried goods from Baltimore to Florida ports on through bills of lading covering railroad transportation from interior points to Baltimore and tariffs covering such transportation were filed with the Commission. (R. 26, 65.)

The railroads serving Baltimore cooperated with respondent in arranging to have bills of lading issued at interior points directed to respondent at Baltimore and showing on their face the ultimate destination in Florida. The Pennsylvania Railroad issued a circular letter to its agents quoting a letter from the respondent outlining this method of shipping to Florida ports by respondent's steamship line. (R. 91.) A circular issued by the Baltimore & Ohio (R. 63) after stating that respondent would not accept freight on through bills of lading on traffic destined to Florida advised (R. 65):

> Rail bills of lading should show name of ultimate consignee, c/o the designated steam-

ship line, destination Locust Point, Baltimore, Md., and in the body of the bill of lading should appear notation indicating ultimate destination in Florida.

The foreign freight agent of the Western Maryland familiar with railroad shipments delivered to respondent at Baltimore (R. 94) admitted that his company might have written letters of instruction similar to the circulars issued by the Pennsylvania and the Baltimore & Ohio. (R. 95–96.) Shippers were generally informed as to the method of handling rail and water shipments from interior points to Florida ports via respondent's steamship line from Baltimore. (R. 51–52.)

The case was tried before a jury. After the United States and respondent had presented their evidence the District Court directed a judgment for the defendant and on appeal to the Circuit Court of Appeals that court affirmed the judgment of the District Court. (R. 17, 203.)

SPECIFICATION OF ERRORS

The Circuit Court of Appeals erred:

I. In holding that there was not sufficient evidence to go to the jury that respondent was a common carrier engaged in the transportation of property partly by railroad and partly by water under a common control, management, or arrangement for a continuous carriage or shipment.

II. In holding that the District Court correctly directed judgment for the defendant.

REASONS FOR GRANTING THE WRIT

I. Under Section 1 of the Interstate Commerce Act water carriers are subject to the Act when engaged in the transportation of property moving from one State to another partly by railroad and partly by water "when both are used under a common control, management, or arrangement for a continuous carriage or shipment." This Court has never passed upon the question whether a "common arrangement" within the meaning of Section 1 may be found when an initial rail carrier and a connecting water carrier customarily carry continuous through shipments requiring no intervention by the shipper from the time the goods are delivered to the initial carrier until delivery by the connecting water carrier at ultimate destination, and the initial carrier cooperates with the connecting carrier in carriage beyond its own lines, at least to the extent of procuring notations to be made by the shippers on its bills of lading naming the ultimate consignee and destination of the freight, pursuant to which delivery is made by the connecting carrier unless contrary instructions are received from the shipper.

The Commission considers it important to have an authoritative determination of the application of the Commerce Act to rates and charges of water carriers transporting goods under these circumstances. The present suit was brought to test this question.

II. The Government submits that the Circuit Court of Appeals failed to give proper consideration to the decision of this Court in *Baer Bros.* v. *Denver & R. G. R. R.*, 233 U. S. 479. That case held that charges of a railroad for an intrastate haul on a local bill of lading were subject to the provisions of the Commerce Act when it received from a connecting railroad goods which had been delivered to the latter railroad with directions to make an interstate shipment over the two railroads. The controversy involved the provisions of Section 1 of the Commerce Act both before and after its amendment by the Hepburn Act of June 29, 1906 (c. 3591, 34 Stat. 584).

The court followed the interpretation of Section 1 of the original Act adopted by this Court in *Cincinnati N. O. & T. P. Ry.* v. *Interstate Commerce Commission,* 162 U. S. 184, 190, 192–193, to the effect that charges of a railroad carrying goods intrastate were not subject to the Act unless the railroad was engaged in interstate transportation with another railroad or a water carrier when both were used under a common control, management, or arrangement. The Circuit Court of Appeals, in holding *Baer Bros.* v. *Denver & R. G. R. R., supra,* inapplicable to the instant case on the ground that it involved only the question of whether the shipment was interstate, and not the meaning of the words "common arrangement," as used in Section 1 of the Act (R. 202–203), ap-

pears to have misconstrued the decision of this Court. This misconstruction may have been seriously prejudicial owing to the similarity of the question there presented to the issue here.

Wherefore, it is respectfully submitted that this petition should be granted.

WILLIAM D. MITCHELL,
Attorney General.

APRIL, 1930.

BRIEF IN SUPPORT OF PETITION

OPINIONS BELOW

The opinion of the District Court (R. 17, 112) is reported in 33 F. (2d) 211 and the opinion of the Circuit Court of Appeals (R. 193) is reported in 37 F. (2d) 681.

JURISDICTION

The decree of the Circuit Court of Appeals was entered January 18, 1930. (R. 203.) The jurisdiction of this Court rests upon Section 240 (a) of the Judicial Code, as amended by the Act of February 13, 1925.

QUESTION PRESENTED

The question presented is whether it can be held as a matter of law that there is not a "common arrangement" between railroads and a water carrier within the meaning of Section 1 of the Interstate Commerce Act when, pursuant to a well-established custom, goods are shipped interstate by railroad and water as a part of a continuous shipment not requiring any intervention by the shipper from the time the goods are delivered to the initial carrier to the time when the water carrier delivers them at destination and when the railroads connecting with the water carrier cooperate with it in informing shippers as to the notations on the railroad bills of lading which make possible such through shipment.

STATUTE INVOLVED

The pertinent provisions of the Interstate Commerce Act are as follows:

> Section 1 (1). That the provisions of this Act shall apply to common carriers engaged in—
>
> (a) the transportation of passengers or property wholly by railroad, or partly by railroad and partly by water when both are used under a common control, management, or arrangement for a continuous carriage or shipments;
>
> * * * * *
>
> from one State or Territory of the United States, or the District of Columbia, to any other State or Territory of the United States. (C. 91, 41 Stat. 456, 474; U. S. C. Title 49, Sec. 1.)
>
> Sec. 6 (1). That every common carrier subject to the provisions of this Act shall file with the Commission created by this Act and print and keep open to public inspection schedules showing all the rates, fares, and charges for transportation between different points on its own route and between points on its own route and points on the route of any other carrier by railroad, by pipe line, or by water when a through route and joint rate have been established. If no joint rate over the through route has been established, the several carriers in such through route shall file, print and keep open to public inspection as aforesaid, the separately established rates, fares and charges

applied to the through transportation. * * * (C. 3591, 34 Stat. 584, 586; c. 91, 41 Stat. 456, 483; U. S. C., Title 49, Sec. 6.)

Sec. 20 (9). That the * * * district courts of the United States shall have jurisdiction, upon the application of the Attorney General of the United States at the request of the commission, alleging a failure to comply with or a violation of any of the provisions of said Act to regulate commerce or of any Act supplementary thereto or amendatory thereof by any common carrier, to issue a writ or writs of mandamus commanding such common carrier to comply with the provisions of said Acts, or any of them. (C. 3591, 34 Stat. 584, 594; c. 91, 41 Stat. 456, 494; U. S. C., Title 49, Sec. 20.)

STATEMENT

A statement of the facts and of the errors relied upon will be found in the petition.

ARGUMENT

THERE WAS SUFFICIENT EVIDENCE TO SUPPORT A FINDING THAT RESPONDENT AND THE CONNECTING RAILROADS TRANSPORTED FREIGHT FROM INTERIOR POINTS TO FLORIDA UNDER A COMMON ARRANGEMENT FOR A CONTINUOUS SHIPMENT WITHIN THE MEANING OF SECTION 1 OF THE INTERSTATE COMMERCE ACT

The Government concedes that respondent was not required to file tariffs with the Commission unless it was engaged in continuous interstate rail and water shipments pursuant to a common con-

trol, management, or arrangement. The Government also concedes that there was no common control or management between respondent and the connecting railroads. It is equally clear, on the other hand, that continuous rail and water shipments from interior points to Florida could be inferred from the evidence. *B. & O. S. W. R. R. Co.* v. *Settle*, 260 U. S. 166. The narrow issue, therefore, is whether the evidence would support a finding that there was a "common arrangement" within the meaning of Section 1 of the Commerce Act for such continuous rail and water shipments.

The Circuit Court of Appeals was of the opinion that water carriers were made subject to the provisions of the Act solely to prevent evasion thereof by railroads. The Government submits that this is not a sufficient explanation of the purpose of Congress in bringing within the Act continuous interstate rail and water transportation under a common control, management, or arrangement. The rates, charges, and practices of railroads engaged in such transportation would be subject to the Act, although the rates and charges for the water part of the transportation were not governed by the Act. Thus, in the present case where the railroads and respondent contend that respondent need not file its tariffs with the Commission, it is conceded that the connecting railroads can collect for their part of the transportation only the amount of their tariffs on file with the Commission from the interior points to Baltimore. It was therefore not neces-

sary to subject charges for water transportation to the provisions of the Act in order to prevent preferences, discrimination, or other illegal practices by railroads engaged in continuous interstate rail and water transportation, whether they were operating under a common control, management, or arrangement with a water carrier or not.

If the preferences and discrimination of railroad rates are undesirable, similar preferences and discrimination in rates for water transportation would seem likewise undesirable. But water transportation is frequently not standardized to the same degree as railroad transportation, and Congress has not generally required the filing of rates, other than maximum rates, for water transportation. The probable reason for requiring the filing of rates for water transportation when carried on under a common control, management or arrangement for continuous rail and water carriage or shipment is that such water transportation was regarded as sufficiently standardized to justify the requirement that the rates for this water transportation be the same for all shippers as long as they remain in effect. The Government is of the opinion that the words "common arrangement" have the same meaning when applied to continuous transportation by rail and water that they had in the original Act when applied to continuous transportation by two connecting railroads and that decisions of this Court construing these words as used in Section 1 of the original Interstate Commerce Act are relevant here.

Section 1 of the Interstate Commerce Act of February 4, 1887 (c. 104, 24 Stat. 379), reads:

> That the provisions of this act shall apply to any common carrier or carriers engaged in the transportation of passengers or property wholly by railroad, or partly by railroad and partly by water when both are used, under a common control, management, or arrangement, for a continuous carriage or shipment, from one State or Territory of the United States, or the District of Columbia, to any other State or Territory of the United States * * *

The Hepburn Act of June 29, 1906 (c. 3591, 34 Stat. 584), changed the above provision by enclosing in parentheses the words "or partly by railroad and partly by water when both are used, under a common control, management, or arrangement for a continuous carriage or shipment," thereby limiting this phrase to rail and water transportation.

Cincinnati, N. O. & T. P. Ry. v. *Interstate Commerce Commission,* 162 U. S. 184, *supra,* decided in 1896, was a suit to enforce an order of the Commission enjoining three railroads from collecting higher rates on shipments from Cincinnati, Ohio, to Social Circle, Georgia, than on shipments from Cincinnati to Augusta, Georgia, which was 119 miles farther from Cincinnati. The defense was that the goods were carried from Cincinnati to Atlanta, Georgia, by the first two railroads as a through shipment; that these two railroads and

the Georgia Railroad Company also carried through shipments to Augusta, but that the Georgia Railroad Company had given instructions against through shipments to Social Circle; that the rate from Cincinnati to Social Circle was made up of the through rate to Atlanta plus the local rate of the Georgia Railroad Company from Atlanta to Social Circle; and that this local rate was not subject to the jurisdiction of the Commission. This Court defined the issue as follows (p. 189):

> The first question that we have to consider is whether the defendants, in transporting property from Cincinnati to Social Circle, are engaged in such transportation "under a common control, management or arrangement for a continuous carriage or shipment" within the meaning of that language, as used in the act to regulate commerce.

The Court held the Commission's order valid. It said (p. 193):

> All we wish to be understood to hold is, that when goods shipped under a through bill of lading, from a point in one State to a point in another, are received in transit by a state common carrier, under a conventional division of the charges, such carrier must be deemed to have subjected its road to an arrangement for a continuous carriage or shipment within the meaning of the act to regulate commerce. When we speak of a through bill of lading we are referring to the usual method in use by connecting com-

panies, and must not be understood to imply that a common control, management or arrangement might not be otherwise manifested.

Baer Bros. v. *Denver & R. G. R. R.*, 233 U. S. 479, *supra*, was a suit to recover excessive charges, as fixed in a reparation order of the Commission, for transporting plaintiff's beer during the years 1902 to 1907. The beer was delivered at St. Louis, Missouri, to the Missouri Pacific Railway Company, which acknowledged its receipt "in good order to be delivered to the Baer Brothers Company at Leadville, Colorado, via the Denver & Rio Grande." No through bill of lading was issued as the two companies had not established a through route. The Missouri Pacific carried the beer on a local waybill to Pueblo, Colorado, and the Denver & Rio Grande carried it from there to Leadville on a local waybill, naming the Missouri Pacific as consignor and the plaintiff as consignee. On the first shipment complained of the Denver & Rio Grande, on receiving the beer at Pueblo, paid the Missouri Pacific's charges from St. Louis and collected from the plaintiff at Leadville its own charges and the amount advanced to the Missouri Pacific; on subsequent shipments the transportation charges from St. Louis to Leadville were paid in advance at St. Louis, but were divided between the two railroads according to their respective rates from St. Louis to Pueblo and from Pueblo to Leadville. *Baer Bros. Mercantile Co.* v. *Mo. Pac. Ry. Co.*, 13 I. C. C.

329, 330–331. The Missouri Pacific's published tariff from St. Louis to Pueblo was conceded to be reasonable, but the Commission found that the Denver & Rio Grande's charges from Pueblo to Leadville were excessive.

The Denver & Rio Grande contended that in each instance it had received the beer at Pueblo, where a new waybill was issued, and forwarded it as an intrastate shipment on an intrastate rate and that the Commission had no jurisdiction to inquire as to the reasonableness of such intrastate rate. This Court rejected the contention. After quoting from *Cincinnati, N. O. & T. P. Ry.* v. *Interstate Commerce Commission, supra,* at p. 193, it said (p. 491):

> This common arrangement does not depend upon the establishment of a through route or the issue and recognition of a through bill of lading, but may be otherwise manifested. *Ibid.*
>
> That there was a common arrangement between the two carriers here was shown by the long-continued course in dealing, and the division of the freight, with the knowledge that it had been paid as compensation for the single haul. * * *

The facts of this case are strikingly like those here involved. In each case the carriers and the shipper intended a through shipment, although through bills of lading were not issued; in each case the initial carrier, in acknowledging receipt of the freight, indicated that a through shipment was con-

templated, but the goods moved on local bills and no through tariff was on file with the Commission; in each case the initial carrier received the amount of its published tariff for the transportation performed by it, and in each case the shipper was not required to intervene from the time the goods were delivered to the initial carrier to the time they arrived at destination. The decision of the Circuit Court of Appeals in the instant case that there was not sufficient evidence to go to the jury of a common arrangement for a continuous shipment seems inconsistent with the finding of such an arrangement in the *Baer Bros. case.* The fact that shippers were free to change the instructions for delivery at point of destination noted on the bills of lading issued by the initial carrier, does not seem sufficient to distinguish this case from the *Baer Bros. case.*

The Circuit Court of Appeals applied the doctrine of *ejusdem generis* to the words "control, management, or arrangement." The Government submits that the first two words are not sufficiently more specific than the last to make this doctrine applicable. They are all general terms, but they relate to different situations and each word should be given its natural meaning. The successive receipt and forwarding of freight in interstate commerce by two or more connecting carriers under any arrangement by which they mutually facilitate continuous shipments over their lines in the same way as freight is transported on through bills of lading

is, it is believed, evidence of a common arrangement within the meaning of the statute. *United States* v. *Wood,* 145 Fed. 405, 411.

The Circuit Court of Appeals quoted from the proposed report by an examiner of the Commission in the case of *Baltimore Association of Commerce et al.* v. *American Hawaiian Steamship Company et al.,* No. 20306, I. C. C. This case was not considered by the Commission, being dismissed at the request of the complainant. The report proposed by an examiner has no weight as an authority or precedent and is not binding even upon another examiner of the Commission.

There is nothing in the case of *Luckenbach Steamship Co., Inc.,* v. *Southern Railway Co.,* 157 I. C. C. 752, contrary to the Government's contention here. The statement of facts shows merely that the complainant steamship line carried freight from the Pacific Coast to southeastern ports on its bills of lading and that railroads carried the freight from these ports to interior points on railroad bills of lading and that no through route had been established. These facts alone did not constitute a common arrangement for a continuous water and rail shipment. The complainant, moreover, was asking the Commission to adjust the rates of the connecting railroads on the theory that its own rates were not required to be filed with the Commission and the Commission merely decided that, on complainant's own theory of the case, it was not entitled to the relief requested.

CONCLUSION

The Government submits that the decision of the Circuit Court of Appeals was erroneous and that in view of the importance of the question decided in determining the scope of the jurisdiction of the Interstate Commerce Act over continuous rail and water transportation the petition for a writ of certiorari should be granted.

WILLIAM D. MITCHELL,
Attorney General.
JOHN LORD O'BRIAN,
The Assistant to the Attorney General.
CLAUDE R. BRANCH,
CHARLES H. WESTON,
Special Assistants to the Attorney General.

APRIL, 1930.

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